

Office of Chief Counsel
Internal Revenue Service

memorandum

TL-N-7178-98

JForsberg

date: December 21, 1998

to: Chief, Examination Division
North Central District
Attn: Caryl Sharp, Group Manager, Group 1208

from: District Counsel,
North Central District

subject: [REDACTED]

By your memorandum of October 16, 1998, you requested our advice as to whether a [REDACTED] Form 1120 filed by the taxpayer in [REDACTED] should be treated as the taxpayer's return for [REDACTED] notwithstanding the fact that the taxpayer had previously filed another [REDACTED] Form 1120 in [REDACTED]. More specifically, the issue is whether the [REDACTED] Form 1120 should be treated as the taxpayer's return for [REDACTED] for purposes of determining whether the refund claimed thereon can be refunded without the joint committee review required by I.R.C. § 6405(a). It is our view that for purposes of section 6405(a), the [REDACTED] Form 1120, not the [REDACTED] Form 1120, is the taxpayer's return for [REDACTED] and that the refund reflected on the [REDACTED] Form 1120 can not be issued prior to joint committee review.

FACTS

The taxpayer filed a timely Form 7004 automatic extension of the time which extended the time to file its [REDACTED] Federal income tax return to [REDACTED]. On or about [REDACTED] the taxpayer filed a Form 1120 with the Kansas City Service Center showing taxable income of \$[REDACTED], a tax liability of \$[REDACTED], payments of \$[REDACTED], and an overpayment of \$[REDACTED] (the "[REDACTED] Form 1120"). The [REDACTED] Form 1120 was approximately 2 inches thick and gave no indication that it was not intended as the taxpayer's Federal income tax return. Schedule D of the [REDACTED] Form 1120 claimed a net long-term capital loss of \$[REDACTED].

On [REDACTED], the taxpayer filed a Form 1139 (Corporate Application for Tentative Refund) with the Ogden Service Center to carry the capital loss reflected on the [REDACTED] Form 1120 back to the years [REDACTED], [REDACTED], and [REDACTED]. On [REDACTED], refunds

totaling \$ [REDACTED] for the years [REDACTED], [REDACTED], and [REDACTED] were issued to the taxpayer based on the claim for tentative refund.

On or about [REDACTED], the taxpayer filed with the Kansas City Service Center a second Form 1120 for the year [REDACTED] (the "[REDACTED] Form 1120"). The [REDACTED] Form 1120 shows a taxable income of \$ [REDACTED], tax liability of \$ [REDACTED], payments of \$ [REDACTED], and an additional overpayment of \$ [REDACTED]. The Service Center has not acted on the [REDACTED] Form 1120 because of the filing of the [REDACTED] Form 1120.

It is the taxpayer's position that the [REDACTED] Form 1120 was an estimate. It is further the taxpayer's position that because the [REDACTED] Form 1120 was filed within the extension period, it supersedes the [REDACTED] Form 1120 return and should be considered the original return.

DISCUSSION

I.R.C. § 6405(a) provides that:

No refund or credit of any income, war profits, excess profits, estate, or gift tax ... in excess of \$1,000,000 shall be made until after the expiration of 30 days from the date upon which a report giving the name of the person to whom the refund or credit is to be made, the amount of such refund or credit, and a summary of the facts and the decision of the Secretary, is submitted to the Joint Committee on Taxation.

There are several exceptions to the prohibition on issuing refunds in excess of \$1 million prior to joint committee review. The one which is relevant to this case is contained in Treas. Reg. §301.6402-4 which provides that section 6404(a) is not applicable to refunds "caused by timely payments of tax which exceed the amount of tax shown on a timely return." See also, IRM 4572(1), (2), & (3). The exception set forth in Treas. Reg. §301.6402-4 is not contained in section 6405. We believe that the rationale for the exception is that only amounts previously applied in satisfaction of an assessed tax liability can constitute a "refund" for purposes of section 6405 and that therefore estimated payments which have not been applied to satisfy an assessed tax are not subject to the provisions of section 6405. See, I.R.C. §6201(b)(1) (estimated income tax not to be assessed) and I.R.C. §6425(a)(1) (application for adjustment of overpayment arising from excess estimated tax payments does not constitute "a claim for credit or refund").

The [REDACTED] Form 1120 was plainly a valid Federal income tax return. It purported to be a return, contained the information necessary to calculate the taxpayer's liability, and was signed under penalties of perjury. That it may not have been wholly accurate or was based on incomplete information does not change its essential character. Zellerbach Paper Co. v. Helvering, 291 U.S. 172, 180 (1934) ("Perfect accuracy or completeness is not necessary to rescue a return from nullity, if it purports to be a return, is sworn to as such [citation omitted], and evinces an honest and genuine endeavor to satisfy the law"). More to the point, even if the [REDACTED] Form 1120 was in some respects deficient, it clearly was a return sufficient to allow the assessment of the tax reported thereon under I.R.C. §6201(a)(1). It is our view that as the tax reported on the [REDACTED] Form 1120 was properly assessed, the payments applied in satisfaction thereof would constitute a "refund" if returned to the taxpayer and are therefore subject to the joint committee referral procedures of section 6405.

The taxpayer's position that the [REDACTED] Form 1120 was an estimate rather than a return is wholly inconsistent with its having claimed tentative capital loss carrybacks based on the [REDACTED] Form 1120. An application for a tentative carryback allowance can only be filed after the filing of the taxpayer's return for the year giving rise to the carryback. I.R.C. §6411(a) provides, in part, that a tentative carryback application "shall be filed, on or after the date of filing for the return for the taxable year of the net capital loss ... from which the carryback results." If the [REDACTED] Form 1120, not the [REDACTED] Form 1120, was the taxpayer's return for the year [REDACTED], the taxpayer would not have been entitled to the tentative refunds which were claimed on the Form 1139 filed in [REDACTED] of [REDACTED] and which were issued in [REDACTED] of [REDACTED]. See, Rev. Rul. 75-327, 1975-2 C.B. 481 (Form 1120 marked "tentative" is not a return for purposes of processing a Form 1139 (Corporation Application for Tentative Refund))

For certain purposes an amended return filed prior to the due date of the taxpayer's return will be considered the taxpayer's return for the year. King's Court Mobile Home Park, Inc. v. Commissioner, 98 T.C. 511 (1992) (the tax shown on the taxpayer's return for purposes of calculating an underpayment under former section 6653(b) for the negligence and fraud penalties includes tax shown on an amended return filed within the time to file as extended); Rev. Rul. 83-36, 1983-1 C.B. 358 (an amended individual income tax return filed before due date of the return is "the return for the taxable year" for purposes of calculating the estimated tax penalty of former section 6654(b)); Rev. Rul. 78-256, 1978-1 C.B. 438 (an amended corporate income tax return filed before due date of the return is "the return for the taxable year" for purposes of calculating the estimated tax penalty of former section 6655(b)). We do not believe these


authorities, all of which deal with the calculation of penalties, are applicable here. For purposes of calculating penalties, it is reasonable to include in the taxpayer's return position amendments to the taxpayer's return filed prior to the due date of the return. In the present case, however, we believe the question of what is the return turns on whether putative return formed a basis on which to assess tax.

We note that IRM 457(10).5 contains a procedure whereby a refund can be issued to a taxpayer prior to joint committee referral were, inter alia, the Government will not be disadvantaged by making the refund and the taxpayer posts a bond or other security for the amount of the refund. You may wish to consider this procedure in the present case.

If you have any questions respecting this matter, please call Jack Forsberg at (651) 290-3473, ext. 227.

REID M. HUEY
District Counsel

By:


JACK FORSBERG
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cc: Assistant Chief Counsel
(Field Service)